Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Communications Assistance for Law	)	ET Docket No. 04-295
Enforcement Act and Broadband Access and	)	
Services	)	RM-10865

REPLY COMMENTS OF GLOBAL CROSSING NORTH AMERICA, INC.

GLOBAL CROSSING NORTH AMERICA, INC.

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Global Crossing North America Inc., on behalf of its U.S. operating subsidiaries (collectively referred to as "Global Crossing"), hereby submits its Reply Comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The Commission should take great care in this proceeding to uphold Congress's intent that the Communications Assistance for Law Enforcement Act ("CALEA") be narrowly tailored and not stifle the development and deployment of new telecommunications technologies. The record in this proceeding amply supports Global Crossing's position that the Commission should not adopt its tentative conclusion that CALEA's "Substantial Replacement Provision" covers information services. CALEA excludes information services, including broadband access services, from its requirements. Neither the Commission's *NPRM* nor the comments filed in this proceeding provide a reasoned basis for overriding this statutory prohibition.

As Global Crossing urged in its initial Comments, and as the record makes clear, if the Commission nevertheless determines to apply CALEA to broadband access services, it must provide the industry with sufficient time to develop uniform standards, deploy compliant

[1] *Communications Assistance for Law Enforcement Act and Broadband Access Services*, Notice of Proposed Rulemaking, ET Docket No. 04-295, RM-10865, FCC 04-187 (rel. Aug. 9, 2004) ("*NPRM*").

equipment and software solutions, and take the many other steps necessary to successfully integrate surveillance capabilities into their networks. The 90-day transition period proposed in the *NPRM* would not provide nearly enough time.

Further, the record supports Global Crossing's position that the Commission should not remove Law Enforcement's obligation to compensate carriers for the reasonable expenses of conducting lawfully ordered surveillance, including the costs to maintain the equipment and software required to comply with such surveillance requests. This obligation is governed by the wiretap provisions in Title 18 of the United States Code, as well as state law, and it is not within the Commission's statutory authority to alter the rights of carriers under these laws. Shifting financial responsibility to carriers also would disserve the public interest. The current system appropriately encourages Law Enforcement to consider the issue of costs of potential surveillance requests, adding a critical layer of accountability to the process. Moreover, if the Commission requires carriers to shoulder the financial cost of lawfully ordered surveillance, such a change would threaten to make many services uneconomical, especially for smaller companies that do not have large customer bases over which to distribute the potentially significant costs of compliance.

II. THE RECORD IN THIS PROCEEDING DEMONSTRATES THAT A COMMISSION FINDING THAT INFORMATION SERVICES ARE COVERED BY CALEA WOULD BE LEGALLY UNSUSTAINABLE

The record in this proceeding confirms that CALEA, by its plain meaning, does not cover information services.[2] Commenters in this proceeding almost unanimously find the *NPRM*'s interpretation of CALEA's Substantial Replacement Provision to be legally unsustainable in two major respects.

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[2] *See, e.g.*, Comments of BellSouth Corporation at 5-12; Comments of Nextel Communications, Inc. at 2-3; Comments of CTIA – The Wireless Association at 4-5; Comments of the American Association of Community Colleges, *et al.* ("EDUCAUSE Coalition") at 4-6.

First, in the *NPRM*, the Commission virtually ignores the definition of "information service," which Congress defined substantially similarly in CALEA and the Communications Act of 1934 as amended (the "Act").[3] Instead, the *NPRM* focuses exclusively on how one might expansively read the definition of "telecommunications carrier" under CALEA to cover services that the Commission has defined as "information services" under the Communications Act. The Commission then argues that "where a service provider is determined to fall within the Substantial Replacement Provision, by definition it cannot be providing an information service for the purpose of CALEA."[4] This type of circular reasoning would not likely withstand judicial scrutiny. The Commission must provide a reasoned analysis of how a service that it has found to be "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" under the Communications Act does *not* meet this definition under CALEA. The Commission has found that broadband access services are information services,[5] and the *NPRM* does nothing to refute this conclusion.

Second, CALEA's Substantial Replacement Provision applies only where the Commission finds a service to be "a replacement for a *substantial* portion of the local telephone exchange service."[6] In the *NPRM*, the Commission reads the word "substantial" out of this definition by proposing to apply the Substantial Replacement Provision to services that replace

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3 *NPRM* at ¶ 50. *See, e.g.*, Comments of Cingular at 6; Comments of Yahoo! Inc. at 4-7; Comments of Earthlink, Inc. at 3-10. The Communications Act and CALEA both include the following language to define "information services" -- "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." 47 U.S.C. §§ 153(20), 1001(6).

4 *NPRM* at ¶ 50.

5 *Id. See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, CC Docket No. 02-33, 17 FCC Rcd 3019, at ¶ 21 (rel. Feb. 15, 2002).

6 47 U.S.C. 1001(8)(B)(ii) [emphasis added].

"*any* portion of an individual subscriber's functionality previously provided via POTS."[7] This flies in the face of the most basic tenets of statutory construction.[8] Even the Department of Justice is critical of the Commission's statutory analysis, advising the Commission that its broad interpretation of the statute goes too far: "The Commission should conclude that a service replaces not just '*any* portion of an individual subscriber's functionality previously provided via POTS' but in fact replaces a *substantial* portion of local telephone exchange service."[9]

Thus, the record in this proceeding demonstrates that the Commission's proposed interpretation of CALEA to cover broadband access services is overbroad and would not likely be upheld on appeal. It would disserve the interests of the industry, consumers and Law Enforcement for the Commission to issue a decision that expands CALEA's reach in a manner that is legally unsustainable. The Commission should therefore decline to apply CALEA to broadband access services and other information services.

III. THE RECORD SUPPORTS PROVIDING FOR A REASONABLE TRANSITION PERIOD FOR CARRIERS TO BRING NEWLY COVERED SERVICES INTO COMPLIANCE

A. Broadband Service Providers Have A Reasonable Expectation That Their Services Are Not Subject to CALEA

The record in this proceeding demonstrates that, if the Commission determines that CALEA covers broadband access services or other information services, such a finding would

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7 *NPRM* at ¶ 44.

8 Global Crossing Comments at 6-8. *See Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (finding that administrative interpretation of a statute contrary to its plain language is not entitled to deference); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (reviewing court gives deference to agency's interpretation of the statute only if agency's interpretation is not in conflict with the plain language of the statute); *National R. R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 417-18 (1992) (same).

9 Comments of the Department of Justice at 14.

signal a massive shift in Commission policy.[10] Commission precedent and the plain language of the statute provide the industry every reason to believe that broadband access services are not subject to CALEA: (1) Commission precedent continues to instruct that broadband access services are information services under the Communications Act;[11] and (2) as noted above, the definition of "information service" in the Communications Act is substantially similar to the definition in CALEA.[12] The Commission even explains that its tentative conclusions regarding CALEA's coverage of broadband access facilities stems from "the more in-depth inquiry and analysis into certain of CALEA's statutory provisions that we are undertaking, *for the first time,* in this proceeding . . . ."[13] It is wholly reasonable that companies have not invested substantial sums to bring their broadband access services into compliance with CALEA, when Commission precedent indicates that the statute does not cover such services. If the Commission now determines that CALEA covers broadband services, the Commission should ensure that the transition to compliance is not unduly burdensome.

B. CALEA Compliance for Newly Covered Services Will Be a Multi-Step, Time-Intensive Process that Carriers Cannot Achieve in 90-Days

Commenters have widely criticized the Commission's proposed 90-day transition schedule for compliance, suggesting transition periods from a minimum of 12 months to at least 24 months for compliance.[14] Global Crossing and other commenters in this proceeding have

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10 *See NPRM* at n.131 (conceding that "including all facilities-based broadband access providers within the scope of CALEA could be said to depart" from prior precedent).

11 *Id.* ¶ 50.

12 *See, supra,* note 3.

13 *NPRM* at ¶ 50.

14 Comments of BellSouth Corporation at 29 ("instead of the 15-month timeframe advocated by law enforcement, BellSouth Supports a minimum 24-month transition period, which is consistent with the statutory two-year period for extensions in Section 1006(c)(1)");

begun inquiries into how to achieve CALEA capabilities for their services, only to find out that CALEA solutions for many IP-based technologies are not yet available.

It should come as no surprise to the Commission or Law Enforcement that equipment vendors have not yet developed CALEA solutions for services that the statute and Commission precedent so plainly indicate are not legally required. For example, the Coalition for Reasonable Rural Broadband CALEA Compliance ("Coalition") documents the frustrations commonly faced in attempting to obtain straight answers from equipment vendors or even law enforcement agencies regarding CALEA compliant equipment for IP technologies.[15] GVNW Consulting, Inc. ("GVNW") had much the same experience in attempting to obtain CALEA solutions for its clients.[16] In its Comments, GVNW observed:

> In the current NPRM, it is proposed that the carrier be required to implement CALEA functionality in the absence of both standards and available equipment. While a large carrier may perhaps have the resources to accomplish this, it is absurd to believe that an ILEC or ISP with less than 50,000 customers has the resources to develop and deploy its own CALEA solution in the absence of one being available from its equipment vendors.[17]

Companies like Global Crossing, which provide specialized services to a relatively small customer base, do not have the resources or customer base of the Bell Operating Companies, and would be particularly harmed by an unreasonable transition schedule.

Comments of the Organization for Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") at 3 ("180 days is more appropriate for small LECs")**;** Comments of Verisign at 40 (requesting a "15 month benchmark period"); Comments of Telecommunications Industry Association at 8 ("currently existing technologies that would be newly subject to CALEA should have at least 18 months")

15 Coalition Comments at 2-7 (describing interactions with the Federal Bureau of Investigation, Cisco Systems and RedBack networks).

16 Comments of GVNW at 5-6.

17 *Id.* at 5.

In light of the uncertainty surrounding what services must be CALEA compliant, and accompanying lack of CALEA compliant equipment that is ready to be deployed, it is essential that the Commission allow carriers to engage in a comprehensive standards-setting process. Standards are essential to facilitate development of compliant equipment and software. As BellSouth explains, "No one disputes that the development of CALEA-compliant solutions for the broad array of packet-mode communications offered today is a complicated and time-consuming process. However, progress has been, and continues to be made."[18] Motorola described the dangers of prematurely applying standards to new services, or newly covered services:

> Uncertainties about how (and whether) that service will be used, how the services will be delivered, over what equipment, through what channels, etc. may not be settled enough that the most efficient approach for [lawfully authorized electronic surveillance] can be determined. Premature forced development of technical CALEA solutions will likely result in solutions that are unwise, inefficient, less effective, and perhaps soon obsolete.[19]

If the Commission determines to subject new categories of services to CALEA, providers of those services must have an opportunity to lend their voice to the standards-setting dialogue.

In addition to industry technology standards, Law Enforcement also must develop capacity requirements for new services. CALEA Section 104 requires Law Enforcement to publish in the Federal Register estimated capacity requirements, and to allow carriers the

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[18] Comments of BellSouth Corporation at 16; *see id.* at 17-19 describing the many efforts made to develop CALEA solutions for packet-mode technologies. *See also* Comments of Verizon at 17 (noting that TIA's J-STD-025-B standard "includes only high-level requirements common across all such packet services, and does not offer technical detail for all relevant services").

[19] Comments of Motorola, Inc. at 17.

opportunity to seek reimbursement for any upgrades required to meet those requirements.[20] This process has not yet begun for broadband access services, further complicating the transition process.[21]

The record in this proceeding confirms that broadband services have their own unique technical issues, especially considering the power that broadband provides consumers to engage service providers apart from the facilities-based provider or even to self-provision services. This phenomenon is perhaps most common for voice over internet protocol ("VOIP") services; there are dozens of managed and non-managed solutions from which customers can choose. To Global Crossing and other broadband services providers, "bring-your-own" VOIP services often are indistinguishable from the constant deluge of other data packets traversing the network. In such cases, the service providers, not the facilities provider, should be responsible for any obligations to Law Enforcement. Numerous commenters have explained, for example, that call identifying information often is buried under several layers of data and is not "reasonably available" to the facilities-based broadband access services provider.[22] These all are issues that will be difficult to solve. The Commission should allow standards bodies to develop the most efficient and effective solutions for meeting Law Enforcement's needs.

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20 47 U.S.C. § 1003.

21 Comments of Satellite Industry Association at 17.

22 *See, e.g.*, Comments of Level 3 Communications, LLC at 12 ("In the ordinary course of Level 3's business, Level 3 is not aware of the third party applications or services that its customers may run, and it would require major modifications to Level 3's network to be able to detect, extract, and deliver third party-associated [call identifying information ("CII")] that may be in the packet stream. Such CII is typically in embedded layers of a packet not examined by Level 3's routers in the course of routing traffic to their destinations, and may be encoded using protocols completely unfamiliar to Level 3").

IV. THE RECORD CONFIRMS THAT THE COMMISSION LACKS STATUTORY AUTHORITY TO RELIEVE LAW ENFORCEMENT OF ITS OBLIGATION TO REIMBURSE CARRIERS FOR SURVEILLANCE REQUESTS

Many commenters also agree with Global Crossing that the Commission should not remove Law Enforcement's statutory duty to compensate carriers for carrying out lawfully authorized surveillance requests.[23] The *NPRM* erroneously implies that a line should be drawn between expenditures to become CALEA compliant and other expenditures to "provision" each individual wiretap.[24] However, Title 18 provides that carriers "shall be compensated . . . by the applicant for reasonable expenses incurred in providing . . . facilities and assistance."[25] "Applicant" refers to the law enforcement agency that obtained the surveillance order.[26] The carrier's right to compensation also is provided under state law.[27] CALEA's discussion of federal Law Enforcement's obligations to pay carriers for CALEA compliance where compliance would otherwise not be reasonably achievable does not eliminate Law Enforcement's other obligations set forth in Title 18 or state law.

The record in this proceeding supports the conclusion that the Commission does not have the statutory authority to regulate what carriers charge Law Enforcement for implementing surveillance orders. CTIA stated in its Comments:

> The Commission has no record upon which to determine whether CALEA-related costs for equipment are reasonable expenses under Title 18 or the various state laws, even if it had jurisdiction to do so.

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23 *See* Comments of CTIA – The Wireless Association at 13-21; Corr Wireless Communications, L.L.C. at 10-13l Comments of Nextel Communications, Inc. at 4-7.

24 *See generally NPRM* at ¶¶ 132-134.

25 *See* 18 U.S.C. §§ 2518(4), 3124(c).

26 *Id.*

27 *See* Comments of CTIA – The Wireless Association at 19 ("In the 46 states that authorized by statute some form of wiretap law, compensation is provided expressly by statute or court practice").

> . . . An individual carrier's costs, and its right to recover them when providing technical assistance in response to a court order for electronic surveillance, is not based on CALEA nor is it an authorized area of inquiry for the Commission under Section 229.[28]

The Commission therefore should decline to adopt Law Enforcement's proposal that the Commission regulate the compensation Law Enforcement pays companies to implement surveillance orders.

It also would disserve the public interest to require carriers to shoulder the costs of carrying out surveillance orders, as commenters note. If the "reasonable expense" involved in a wiretap request would be high, it serves the public interest for Law Enforcement to consider such significant costs prior to compelling a company to fulfill that wiretap request. The requirement that Law Enforcement compensate carriers adds a layer of accountability to the process.

Further, any requirement that carriers and their subscribers bear surveillance costs would disproportionately harm companies deploying new technologies or serving relatively small customer bases. Placing the burden on carriers and their customers would heavily favor the largest companies, such as the Bell Operating Companies, which are able to spread their costs over millions of subscribers. Smaller companies, such as Global Crossing, could not so easily pass costs through. Further, as the Comments demonstrate, Global Crossing and other broadband services providers receive few or no wiretap requests each year. For such carriers, the cost of CALEA compliance, viewed on a per-customer or per-wiretap basis, would be exorbitant. Prohibiting carriers from passing through surveillance costs likely would make the introduction of

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[28] *Id.* at 18.

new services and technologies prohibitively expensive, in direct contravention of the Congressional mandate that CALEA not impede innovation.[29]

V. CONCLUSION

For the foregoing reasons, the Commission should decline to expand the reach of CALEA to broadband access services. If, however, the Commission does subject CALEA to services that CALEA's requirements previously did not cover, it should give carriers sufficient time comply with the statute. Moreover, the Commission should not shift the financial responsibility for the cost of surveillance away from Law Enforcement to carriers and their customers.

Respectfully submitted,

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[29] H.R. Rep. No. 103-827 at 19 (1994) [emphasis in original] ("The requirements of [CALEA] will not impede the development and deployment of new technologies. . . . [I]f a service cannot reasonably be brought into compliance with the interception requirements, then the service or technology can be deployed").